

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SPECIAL CIVIL APPLICATION No. 19944 of 2005****For Approval and Signature:****HONOURABLE MR.JUSTICE JAYANT PATEL**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
 - 4
 - 5 Whether it is to be circulated to the civil judge ?

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GAURANG JANARDANBHAI NIMAKSARI & 1 - Petitioner(s)
Versus
SARVODAY SAHAKARI BANK LTD & 2 - Respondent(s)

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Appearance :

MR NM KAPADIA for Petitioner(s) : 1 - 2.
MR RAVINDRA SHAH for Respondent(s) : 1,
MRS KANAN R SHAH for Respondent(s) : 1,
GOVERNMENT PLEADER for Respondent(s) : 2,
None for Respondent(s) : 3,

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CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL**Date : 06/03/2006****ORAL JUDGMENT**

1.Draft amendment granted.

2.Rule. Mr. Shah, learned counsel appearing for

respondent Nos. 1 & 3 as well as Mr. Pujari, learned AGP for respondent No. 2 waives notice of rule and with the consent of the learned advocates appearing for both the sides, the matter is finally heard today.

3. The short facts of the case are that the respondent Bank filed the Suit being Lavad Suit No. 1096/02 against the petitioners for recovery of Rs. 2,91,392/- with interest and in the said Suit, award came to be passed on 23.12.2002. However, it is the case of the petitioners that such award was ex-parte award. It appears that as the amount as per the award was not paid, the notice was issued for recovery of the amount on 08.04.2004. The petitioner preferred Appeal before the Gujarat Cooperative Tribunal and in the said Appeal, the conditional order was passed of staying execution of the award on depositing the amount as ordered by the Tribunal. The petitioners' case is that the amount in part was deposited but full condition was not satisfied and therefore, it appears that as the condition was not satisfied, the interim order came to be vacated by the Tribunal. Thereafter, the Bank proceeded for execution of the award and notice for attachment was issued on 08.01.2005. Thereafter, there were correspondence for settlement by the petitioners but ultimately it appears that the same was not materialised and the order of attachment was passed. The said order of attachment ultimately came to be effected and it is the case of the petitioners that the property mortgaged was flat No. 102. However, the petitioners were residing in Flat No. 102 as well as flat No. 101 but as both the flats were adjacent, the

wall was removed in between and one entry in the flat was provided. It is the case of the petitioners that the Bank under the order of attachment has applied seal to both the flats viz. flat Nos. 101 & 102, though flat No. 101 as per the petitioner is not mortgaged with respondent Bank.

4.The petitioners moved application to the Tribunal in the pending appeal for directing the respondent Bank to remove the seals. It appears that the Tribunal passed the order on 27.07.2005, whereby the application was rejected but it was observed by the Tribunal that if 50% of the amount is deposited by the petitioners of Rs. 2,50,000/- and the remaining amount by post dated cheques, the Bank shall open the seal. The amount of cost was also ordered by the Tribunal of Rs. 1,000/-. It is under these circumstances, the petitioners have approached this Court by preferring this petition.

5.Heard the learned counsel appearing for the petitioners as well as for the respondent Bank and the learned AGP.

6.Mr. Shah, learned counsel appearing for the respondent Bank at the outset submitted that now the matter is not pending before the Tribunal because the Appeal was dismissed for default on 24.02.2006 and he placed on record the order passed by the Tribunal. Mr. Kapadia, learned counsel appearing for the petitioners states that the petitioners were not aware about the aforesaid order of the Tribunal of dismissing the appeal for default. However, he prays that the petitioners may be permitted to challenge the said order of the Tribunal

by challenging the order dated 24.02.2006 passed by the Tribunal.

7. Since the aforesaid order dated 24.02.2006 is passed by the Tribunal pending the present proceedings, the petitioners can be permitted to challenge the said decision of the Tribunal dated 24.02.2006 of dismissing the Appeal for default. Hence such permission is granted.

8. It appears from the record that the notice for attachment is for flat No. 102, the Mortgage Deed in favour of the Bank is for 1/18th share in the property. There are 18 flats constructed and therefore, it prima facie appears that flat No. 102 which is a property mortgaged in favour of the Bank. It also prima facie appears that flat No. 101 is not a property which is mortgaged with the Bank, but is held by the petitioner as owner being inherited property from his mother. When the notice and the order of attachment was for Flat No. 102, while implementing the order of attachment, the possession of flat No. 101, could not have been taken by the Bank. I would have examined the matter further but at this stage, Mr. Shah, learned counsel appearing for the respondent Bank submitted that as the criminal complaint is pending, he is not inviting the reasons and the Bank shall hand over the possession of flat No. 101 for the present but without prejudice to its right to proceed in accordance with law and therefore, I find it proper to leave the matter at that stage without observing further. Suffice it to say that while effecting the order of attachment, the possession of

flat No. 101 could not have been taken by the respondent Bank. It may be recorded that as per the respondent Bank, the petitioners have voluntarily handover the possession of the flat and it was never disclosed by the petitioners that there are two separate flats viz. flat Nos. 101 & 102 which is combined by removal of internal wall in between and making alteration for the main door. Be it as may be, but when flat No. 101 was not mortgaged or order of attachment was only for flat No. 102, it appears that the action of the Bank of applying a seal to portion comprising of flat No. 101 cannot be prima facie said as legal.

9. Apart from the above, even while exercising the power of attachment under Rule 118 of the Gujarat Cooperative Societies Rules, this Court had an occasion to consider the matter at the admission stage in Special Civil Application No. 14580 of 2003 and it was observed inter alia as under :

"Prima facie, it appears that there is express provision for the manner and mode of attachment of immoveable property. The manner and mode of attachment of moveable property would be different than that of immoveable property. In the immoveable property, it is the right of that property, which is to be attached and, therefore, it, prima facie, appears that when the attachment of immoveable property is to take place, rights of the owner in that immoveable property can be attached by prohibiting him from transferring or alienating the ownership or possession of the property. If the judgement debtor is in occupation of the property, it would be within the right and power of the Bank to draw the inventory of the possession of the property and affix the order of attachment and also make publication thereof, as

provided under Rule-119 of the Rules and the Bank may also make it known to the public at large that the rights of the ownership and the possession of the property are attached. In my, prima facie view, such power of attachment cannot be read to evict the judgement debtor from the property, which is in his occupation. It may be that at the time when the sale takes place, the possession may be handed over even by taking possession from the judgement debtor, but, the same would be a matter when the sale is to be effected and when the purchaser is to be put into possession after receipt of the consideration. Merely because such powers are read at the time when the sale is to be given effect, prima facie, I find that the contention of Mr.Raval cannot be accepted that at the time when the attachment of the immoveable property is to take place, the persons, who are in occupation, can be evicted and seal can be applied. Had it been a case where the immoveable property was a vacant property, matter would have been different. Seals may be applied on the attached property with a view to ensure that no new person is inducted in the property, but, that does not mean that those who are already in occupation are to be evicted under the so-called power of attachment."

10. Thereafter, as per the order dated 27.08.2004 passed in Special Civil Application 10612 of 2004, in view of the fact that the possession was handed over by the concerned Judgment Creditor to the Judgment Debtor, the matter was finally disposed of.

11. Therefore, such can be the circumstances even for flat No. 102 also but, it appears that as per the respondent Bank, the petitioners voluntarily handed over the possession, which of course is disputed by the petitioners, but, as the interim order is vacated by the Tribunal against the execution of the award and as the Appeal before the Tribunal is also dismissed for

default on 24.02.2006 and as the family of the petitioners was staying in a combined property of flat Nos. 101 & 102, and as by making separate entry for flat No. 101, the family of the petitioners can reside in flat No. 101 and as further, the petitioners, after the order passed by the Tribunal has not deposited any amount with the respondent Bank and therefore, considering the facts and circumstances and more particularly in view of the final order, which may be passed by this Court hereinafter, I find that the possession of flat No. 102 can be retained by the respondent Bank until the issue for examining the legality and validity of the award of the Nominee is finalised by the Tribunal.

12.The perusal of the order passed by the Tribunal shows that it has proceeded on the basis that there is only one flat and there is the distinction between flat No. 101 and flat No.102 is duly not considered. It is also not considered by the Tribunal that the Bank in any case could not have applied seal for the portion of the flat comprising part of flat No. 101. Therefore, it can be said that the Tribunal while exercising the power has committed error apparent on the face of record, which deserves to be interfered by this Court.

13.It appears that the proceedings of the Appeal are terminated as per the order dated 24.02.2006 since the matter is dismissed for default. The case of the petitioners is that the petitioners were not aware about the aforesaid proceedings and the challenge to the said order is permitted.

14. Considering the facts and circumstances of the case, it appears that as the appeal is in any case not decided on merits, the matter can be considered by the Tribunal for hearing of the Appeal on merits and the order for dismissal of the appeal for default can be interfered with.

15. In any case, the award passed by the Nominee was an ex-parte award and therefore, if the appeal is heard on merits by the Tribunal, the rights of the parties can be finalised so far as they relate to liability to pay the amount as claimed in the suit or otherwise.

16. In view of the aforesaid, I find that the following directions shall meet with the ends of justice :

1. The order dated 24.02.2006 passed by the Tribunal dismissing the appeal for default is quashed and set aside with the direction to the Tribunal to decide the appeal on merits against the award passed by the Nominee in Lavad Case No. 1096 of 2002.

2. The interim order passed by the Tribunal dated 27.07.2005 is modified as under :

- i. The respondent Bank shall remove seal within 48 Hrs. from the date of the receipt of the order of this Court of both the flats viz. flat No. 101 & flat No. 102 and shall permit the petitioners to construct a partition wall

between the property of flat No. 101 & 102 and also shall permit the construction of separate entry for flat No. 101. The aforesaid shall be completed by the petitioners within 3 days from the removal of the seal.

ii. After the partition wall and separate entry are constructed, the petitioners shall remove all their belongings lying in flat No. 102 and may transfer in flat No. 101 within 48 hrs. thereafter.

iii. The respondent Bank shall be at the liberty to apply the seals after the belongings are shifted to flat No. 101 by the petitioners and shall hold the possession of the property of flat No. 102 until the final disposal of the appeal by the Tribunal.

iv. In case if pending the appeal before the Tribunal, the petitioners show willingness to pay the outstanding loan amount of the bank with interest plus lawful expenses, which have been debited by the Bank in the account of the petitioners, the Bank may consider such proposal as may be permissible in law.

3. The rights of both the sides qua flat No. 102 shall be subject to final decision in the appeal before the Tribunal.

17. The petition is partly allowed in terms of the

aforesaid directions. Rule partly made absolute.
Considering the facts and circumstances, there shall
be no order as to costs.

Direct service is permitted.

(JAYANT PATEL, J.)

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